

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

**FIELD FAMILY ASSOCIATES, LLC
d/b/a HAMPTON INN NY – JFK AIRPORT**

and

CASE NO. 29-CA-26729

**NEW YORK HOTEL AND MOTEL TRADES
COUNCIL**

Sharon Chau, Esq., Counsel for the
General Counsel
Andrew S. Hoffmann, Esq., Counsel
for the Respondent
Jane Lauer-Barker, Esq., Counsel
for the Union

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case on various days in March and April, 2005.¹

The charge was filed on January 11, 2005 and the Complaint was issued on January 18, 2005. In substance, the Complaint alleged:

1. That on or about May 25, 2004, the Respondent, by Gary Isenberg, its executive vice president of operations, in an effort to dissuade employees from supporting the Union, promised employees **(a)** a wage increase, **(b)** the reinstatement of a matching 6% contribution to their 401(k) plans and **(c)** other unspecified improvements in their working conditions.

2. That in early July 2004, the Respondent, for discriminatory reasons, issued a verbal warning to Jessie Morris.

Based on the entire record, including my observations of the demeanor of the witnesses and after considering the arguments of counsel, I hereby make the following

¹ This case was scheduled to be heard in conjunction with another Consolidated Complaint involving a related hotel, (the Holiday Inn), commonly owned with the Hampton Inn. Nevertheless, this case was never officially consolidated with the others and as the issues here are much simpler, I think that it is not necessary to wait before issuing a Decision.

Findings and Conclusions

I. Jurisdiction

5 The parties agree and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

10 The Field family organization owns seven hotels, four in Philadelphia and three in New York. The three New York hotels are the Crown Plaza at LaGuardia airport, and the Holiday Inn and Hampton Inn at JFK airport.

15 In March or April 2004, the Union commenced an organizing drive amongst the employees of the Crowne Plaza Hotel. A petition was filed by the Union in relation to the employees at the Crowne Plaza and an election was held on May 13, 2004. The Union won that election and ultimately was certified as the exclusive collective bargaining representative.

20 At the time that the election at the Crowne Plaza was still pending, the Respondent, in April 2004, engaged Quentin Nelson, a labor relations consultant who along with Respondent's managers, Chris Polityka² and Gary Isenberg,³ discussed the Union's organizing effort at the Crowne Plaza and the likelihood that the Union would soon commence organizing at the Respondent's JFK airport hotels. Nelson suggested and the Respondent's managers approved an "employee relations audit." The plan was that Nelson would hold a series of meetings with the employees and ask them what their concerns were and what they would like to see changed.

30 On April 28, 2004, Christopher Polityka, the Corporate Director of Human Resources sent a letter to the employees stating:

35 Last June, we announced a change in our 401k matching contribution for the Airport Hospitality 401k Plan from a dollar for dollar match up to 6%... to a dollar for dollar match up to 3%.... In our FAQ's sheet on our 401k program dated June 30, 2003, we stated, "this match will be re-evaluated annually based upon business and economic circumstances." With the one-year anniversary of this change approaching, we wanted to assure each of you that the current dollar for dollar match is being revaluated for 40 2004/2005.

45 On May 3, 4 and 5, 2004, Nelson conducted a series of meetings with the employees of both JFK hotels. He asked them what their problems were and was told that the major issues were the way employees were being treated by some of the supervisors; the cutback that had previously been made in contributions to the 401(k) pension plan; and the failure of the company to give wage increases. In addition, Nelson showed each group of employees a video concerning unionization. (There is, therefore, no question but that this survey was directly linked to the issue of unionization).

² Vice President of Human Resources.

³ Vice President of operations.

5 Nelson used an intriguing term to refer to this set of meetings; describing them as a means of “ventilating the work force.” By whatever name, it is clear that this activity was intended, in essence, as a prophylactic measure, designed to influence the employees against unionization if and when, the Union started to organize at the two JFK hotels.

10 Nelson made his initial report to the Respondent on or about May 5, and went out to California to do some consulting work for another Company that was involved in a union organizing campaign. On or about May 7, 2004, Nelson sent by e-mail, a list of the employees’ concerns and complaints. (The Respondent could not locate or retrieve this e-mail message).

15 The Union’s initial meetings in 2004 with the employees of the two JFK hotels took place on May 20, 21, 22, 2004 at the Radisson Hotel, which is right down the street. During that period of time, numerous employees walked over to the Radisson after work and the Union solicited employees to sign authorization cards. Given the number of people who attended these meetings, it is probable that the Respondent’s management was aware that something was going on.

20 On May 25, 2004, the Company held a meeting with its employees from the two JFK hotels and announced a group of promises. These are reflected in General Counsel Exhibit 14 and include the following:

25 1. That all new hires who hadn’t yet received a \$1.00 increase after 90 days would be paid the increase on June 10, 2004.

2. That any employee who had worked overtime and had not gotten properly paid would, after an audit, be paid the correct amount on June 17.

30 3. That effective June 1, 2004, seniority would determine work schedules, days off, vacation and holiday time.

35 4. That wage increases would be announced on or before June 1 and become effective as of that date.

5. That the company would be re-installing, as of June 15, 2004, the program of matching up to 6% of the employees’ contribution to the 401(k) plan.

40 At some point during the meeting on May 25, some of the employees began chanting that they wanted the Union. According to Respondent’s witnesses, this was the first time that they had any knowledge of the Union’s organizing efforts at the JFK hotels. But this is not likely and it nevertheless was conceded that at least a month earlier, management already had anticipated this union effort and had hired Quentin Nelson to help deal with it.

45 On May 28, 2004, three days after the May 25 meeting, the Union filed its original petition in 29-RC-10220. That petition asked for an election to be conducted in a combined unit of the two JFK hotels. The petition was later withdrawn on June 15, 2004, because the parties agreed that there

should be two separate voting/bargaining units. Two new petitions were then filed and elections were held on August 12 and 13, 2005.⁴

5 In early June 2004, the Respondent sent another letter to the employees, this time taking back the promises that it had made on May 25. The letter stated:

10 I have met with several of you over the past two weeks and have indicated as of June 1st that we would restore the 6% matching benefits under the 401K plan and we would increase your wages....

15 On late Friday afternoon, May 28, 2004 we received notice that the Hotel and Motel Trades Council planned to file a petition with the National Labor Relations Board seeking a secret ballot election to determine whether that union would have the right to represent associates employed by the Hampton Inn and the Holiday Inn.... As a result of the NLRB's processing of that petition, implementation of the wage increases and other changes we had announced would go into effect on Tuesday, June 1, will be delayed.

20 We have been advised that the law does not permit us to make the indicated changes in your wages, fringe benefits and other working conditions during the period prior to the election. If we did so, we would be accused of "bribing" associates in order to influence the outcome of the election. Accordingly, we must postpone making any of these changes. We are doing so for the sole purpose of avoiding the appearance that 25 we were trying to influence either your decision on whether to support the union or the election's outcome. While it is our intention to make these changes, regardless of the outcome of the election, the collective bargaining process (if the union is voted in) may affect our ability to do so.

30 We will notify you if, and when, the NLRB schedules an election. Between now and then, you will have to decide for yourself whether you are better off with or without a union. This will be one of the most important decisions you will ever be asked to make. I hope, after considering all of the facts, you will make what we believe is the right decision and choose to remain union free. I want to make my position crystal clear to you: I am strongly opposed to a union in our hotel.

35 In relation to the Hampton Inn, the only other incident that is alleged to be a violation of the Act occurred in early July 2004. Jessie Morris testified that she carried a bunch of union flyers into the employee cafeteria and put them down on a table. She testified without contradiction that later in the day, her manager, Jennifer Cluden, called her into the office and asked if she had been distributing flyers. Morris said that she did not and that Cluden told her that if she distributed leaflets 40 in the hotel she would receive a written warning. In this regard, I note that the employee handbook has a no solicitation/no distribution rule that states:

45 Solicitation on the Hotel premises or distribution of literature of any type is not permitted by non-hotel associates. Hotel associates are not permitted to solicit 50

⁴ On June 2005, I issued a Decision on Objections in Case Nos. 2-RC-10237 and 2-RC-10238, JD(NY)-24-05), where I recommended that the Employer's Objections be overruled and that Certifications of Representative be issued to the Union.

during their, or the solicited associate's working time. Hotel associates also are not permitted to distribute literature during working time or in working areas for any purpose.

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III. Analysis

The Respondent argues that the promises it made at the meetings on May 25, 2004 were lawful because they were made prior to the time that the Union filed a petition for an election and prior to the time that the Employer became aware of the Union's attempt to organize the employees at the two JFK airport hotels. In this regard, the Respondent relies on a whole series of cases wherein the Board and the Courts have held that in the absence of an explicitly stated *quid pro quo*, the Board will presume that a promise or grant of benefit made during a union's organizing campaign or after an election petition has been filed will be presumed to be intended to influence the potential voters in an NLRB election. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1963); *Baltimore Catering Co.*, 148 NLRB 970 (1964); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1344 (2000); *B & D Plastics*, 302 NLRB 245 (1991); *Speco Corp.*, 298 NLRB 439, 443 (1990). This presumption of illegal interference can of course be rebutted if the Employer can establish a legitimate explanation for the timing of the grant of benefits and this usually consists of evidence that they were part of an existing practice or that they were planned beforehand.

But one need not look at the timing of the promises in this particular case in order to show a presumption that the Respondent's intent was to influence its employees regarding their union support.

The evidence unequivocally shows that the Respondent hired Quentin Nelson, a labor consultant in April, because it was already engaged in an election campaign involving this same union at the Crowne Plaza Hotel. It is admitted that when Nelson discussed this situation with Respondent's management, they agreed that the Union would likely extend its campaign to the JFK airports and that to meet this issue, the Respondent, through Nelson, would solicit employee complaints which would then be remedied. And this is precisely what happened.

During a three day period at the outset of May 2004, Nelson canvassed the employees at the two JFK hotels and asked them what their complaints were. While at it, he also showed them a short video about unions. The employees responded and Nelson drew up a list of complaints and issues that he e-mailed to management around May 7. This in turn, generated a series of management meetings where the Company decided to remedy many of the employee complaints, including reinstating the old rate of payments to the 401K plan and the granting of wage increases effective on June 1.

Mr. Nelson called this entire exercise an example of "ventilating the work force." I would call it a course of conduct intended to deter employees from seeking union representation. Whether or not the Employer was specifically aware, as of May 25, that the Union had begun its organizational efforts at the Hampton and Holiday Inns, there is no question that management correctly anticipated that the Union would shortly commence to organize the two JFK hotels. The promises were clearly made in anticipation of a petition being filed by the Union and in my opinion they clearly were intended to deter employees from supporting the Union.

What is even cleverer is that once the Union did file its petition, the Respondent sent a letter to its employees telling them that because of the petition, it had to delay implementation of its promises because otherwise it could be accused of "bribing" them. Well it already had bribed them

in anticipation of a petition being filed, and its “retraction” could now serve as the means to blame the Union for its failure to grant the wage increases and other benefits that had already promised. This, in my opinion was too clever by half and an example of someone wanting to have his cake, while eating it. Having decided to promise benefits in anticipation of the Union filing a petition, the Employer could then tell the employees that they were not going to get the promises because the Union filed the petition. Some might call this clever. I call it a violation of the law.⁵

I also conclude that the Respondent violated the Act when it warned Ms. Harris in early July. Notwithstanding the existence of a no distribution rule valid on its face, the facts here show that Harris simply brought a bunch of union flyers into the employee cafeteria, a non-work area, and left them on a table. She did not distribute this literature during work hours or in work areas. The warning therefore was too broad and interfered with employees’ rights to engage in appropriate union activity during non-work time, in non-work areas. *Willamette Industries*, 306 NLRB 1010, 1017 (1992); *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986); and *Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001).

Conclusions of Law

1. The Respondent, Field Family Associates, LLC d/b/a Hampton Inn NY – JFK Airport, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. New York Hotel and Motel Trades Council, is a labor organization within the meaning of Section 2(5) of the Act.

3. By promising wage increases and other benefits with the intention of dissuading employees from voting for or supporting the Union, the Respondent violated Section 8(a)(1) of the Act.

4. By warning an employee that she would be subject to discipline because she brought union literature into the employee cafeteria, the Respondent violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Because many of the employees speak Spanish, I shall recommend that the Notice be in English and Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:⁶

⁵ In my opinion the June letter to the employees, in these circumstances cannot be construed as a legitimate disavowal. Cf. *Passavant Memorial Area Hospital* 237 NLRB 138 (1978).

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Field Family Associates, LLC d/b/a Hampton Inn NY – JFK Airport, its officers, agents, successors, and assigns, shall

1. Cease and Desist from

(a) Promising wage increases and other benefits with the intention of dissuading employees from voting for or supporting the Union.

(b) Warning employees that they would be subject to discipline because they bring union literature into the employee cafeteria or in any other non-working area.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action that is necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in New York, copies of the attached notice in English and Spanish, marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since May 25, 2004.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

Raymond P. Green
Administrative Law Judge

⁷ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT promise wage increases and other benefits with the intention of dissuading our employees from voting for or supporting the New York Hotel and Motel Trades Council.

WE WILL NOT warn our employees that they would be subject to discipline because they bring union literature into the employee cafeteria or in any other non-working areas.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

Field Family Associates, LLC d/b/a Hampton Inn NY –
JFK Airport,

(Employer)

Dated _____ **By** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor
Brooklyn, New York 11201-4201
Hours: 9 a.m. to 5:30 p.m.
718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.

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